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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-5419

GEORGE D. VAN CUREN, Petitioner

vs.

ARNOLD R. JAGO, SUPT., Respondent

ENTRY OF APPEARANCE OF COUNSEL

SIMON B. KARAS, a member of the bar of this Court, hereby enters his appearance as counsel of record on behalf of respondent, Arnold R. Jago.

WILLIAM J. BROWN
Attorney General

Simon B. Karas

SIMON B. KARAS
Assistant Attorney General
State Office Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43215
(614) 466-5414

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RESPONSE TO
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LOUIS A. JACOBS
1659 North High Street
Columbus, Ohio 43210

COUNSEL FOR PETITIONER

WILLIAM J. BROWN
Attorney General

SIMON B. KARAS
DENNIS L. SIPE
Assistant Attorneys General
State Office Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43215
(614) 466-5414

COUNSEL FOR RESPONDENT

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QUESTION PRESENTED

I. WHETHER THE COURTS BELOW PROPERLY FOUND THAT DUE PROCESS PROTECTIONS ARE NOT APPLICABLE TO A PAROLE RESCISSION MADE PRIOR TO RELEASE FROM THE INSTITUTION.

STATEMENT OF THE CASE

On May 22, 1972, Petitioner George D. Van Curen (hereinafter "Van Curen") was sentenced to a term of not less than six (6) years and no more than one hundred (100) years following his plea of guilty to two counts of embezzlement, four counts of forgery, four counts of uttering and publishing forged instruments and one count of obtaining money under false pretense in violation of Sections 2907.34, 2913.01, 2913.01, and 2911.01, Ohio Revised Code, respectively.

Under the sentence imposed by the Court of Common Pleas of Cuyahoga County, Ohio, Van Curen was eligible for parole in March of 1976. However, on January 1, 1974, the "shock parole" statute, Section 2967.31, Ohio Revised Code, was enacted.

Pursuant to a formal opinion of the Ohio Attorney General Number 74-005 issued January 24, 1974, the Ohio Department of Rehabilitation and Correction determined that he was eligible for consideration for early parole under the provisions of the shock parole statute contingent upon meeting the applicable criteria.

On April 17, 1974, Van Curen appeared before a two-man panel representing the parole board. This panel recommended to the parole board "POA April 23, 1974."[1] On the same day, the parole board approved the recommendation.

Upon receipt of information that Van Curen had not been truthful to the panel nor truthful in his parole plan, the parole board, on April 23, 1974, rescinded the action taken at the April 17, 1974 meeting and voted to continue the cause until June, 1974 for further investigation and complete report.

On June 20, 1974, the parole board met at London Correctional Institute to conduct the continued hearing of Van Curen's application for shock parole. Based upon all the facts presented to the board, they voted unanimously, to deny his application.

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[1] An "on or after" date is used in granting parole since any grant is conditional pending approval and investigation of the parole plan which the inmate must prepare once he is granted parole. [Shoemaker Depo., page 30. This case was submitted to the District Court below on depositions and briefs; therefore, reference to the record is made by citation of the name of the deponent and the relevant page(s)].

On May 16, 1974, Van Curen filed an original petition for a writ of habeas corpus in the Supreme Court of Ohio. (Case Number 74-446).

On September 6, 1974, the Supreme Court of Ohio dismissed his petition for a writ of habeas corpus.

On August 28, 1974, Van Curen then filed an original mandamus action in the Ohio Supreme Court.

On March 24, 1976, the Supreme Court of Ohio denied the writ requested by Van Curen. State ex rel. Van Curen v. Adult Parole Authority, 45 Ohio St. 2d 298 (1976) (Van Curen Appendix at A-11).

On November 15, 1978, this Court denied a petition for a writ of certiorari concerning Van Curen's mandamus action. Van Curen v. OAPA, Number 75-6955 (U.S., filed June 21, 1976).

On February 14, 1977, Van Curen filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Ohio, Western Division.

On August 1, 1977, Judge David S. Porter referred the matter to the Magistrate who filed a report on August 24, 1977. On the same date, Judge Porter adopted the Magistrate's report and denied the petition for a writ of habeas corpus. (Van Curen Appendix at A-3 to A-10).

Van Curen next filed a notice of appeal in the Sixth Circuit Court of Appeals. The case was briefed and argued. The Court affirmed the District Court's judgment. Case Number 77-3558. (Van Curen Appendix at A-1).

Van Curen then filed the instant petition for a writ of certiorari thereby bringing the issues contained therein before this Court for consideration.

ARGUMENT

I. WHETHER THE COURTS BELOW PROPERLY FOUND THAT DUE PROCESS PROTECTIONS ARE NOT APPLICABLE TO A PAROLE RESCISSION MADE PRIOR TO RELEASE FROM THE INSTITUTION.

Respondent would submit that before the procedural dictates of the due process clause are applicable, there must be a deprivation of a liberty or property interest. Board of Regents v. Roth, 408 U.S. 564 (1972); Bell v. Kentucky Board of Parole, 536 F. 2d 803 (6th Cir. 1977).

To be sure, Respondent would agree that the loss of freedom resulting from the revocation of parole or probation requires due process protections. Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973). However, the denial of a parole or its rescission is not such a "grievous loss".

It is submitted that to determine what is a liberty or property interest one must look to the identifying nature of the underlying substantive interests at stake in order to determine the interests that are subsumed under either "liberty" or "property".

This Court has held in Roth, supra, that:

> "To determine whether Due Process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake. . . . We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property." (Roth, supra, pages 570-571).

This Court then proceeded to find that Roth's interest in continued employment, i.e., his desire for renewal, was neither a "liberty" nor a "property" interest and therefore he could be deprived of that interest without due process.

The Roth, supra, decision points out that although a "grievous loss" may be a necessary prerequisite to the application of due process protections, it is not sufficient alone. The fact that an interest may be substantial does not require the activation of due process protection.

In the instant case, Van Curen's "interest" in being paroled may be substantial but that does not resolve this case. There must first be an inquiry into whether the interest that may be deprived is a constitutionally cognizable "liberty" or "property" interest.

A person convicted of a crime sentenced to imprisonment and confined as a result of a sentence has, in the most basic sense, lost his "liberty" for the period of his sentence. He is lawfully under the physical control of the state. "Lawful

incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." Price v. Johnston, 334 U.S. 266 at 285 (1948).

Respondent would submit that a prisoner has been lawfully deprived of his generalized constitutional liberty interest in freedom from confinement by his conviction and sentence. Hence, there is no "liberty" interest to protect in the instant case.

Respondent would submit that Van Curen does not have a constitutionally cognizable "property" interest in being released from confinement. The Supreme Court of Ohio in State ex rel. Newman v. Lowery, 157 Ohio St. 463 (1953), cert. denied, 344 U.S. 881 (1952), in reviewing a case similar to the one before the Court, affirmed the lower court's decision that "an order of the pardon and parole commission [now the Ohio Adult Parole Authority] granting prisoner a parole at a future date could be rescinded by commission before actual release of the prisoner without showing cause for such rescission in view of the fact that parole never became effective." State ex rel. Newman v. Lowery, 61 Ohio L. Abs. 337, 104 N. E. 590 (C.A. Franklin Cty. 1951).

The Supreme Court of Ohio in deciding Van Curen's petition for a writ of mandamus cited Lowery, supra, as authority that: ". . . [pardon and parole] commission had authority to rescind its order . . . granting a parole effective on or after a future date."

"Parole" is presently defined in Section 2967.01(E), Ohio Revised Code as: ". . . the release from confinement in any state penal or reformatory institution by the Adult Parole Authority. . . ." Therefore, there existed no property interest that necessitated due process protection.

The Sixth Circuit Court of Appeals does not stand alone on this issue. The Fifth Circuit Court of Appeals has reached the same result in Sexton v. Wise, 494 F. 2d 1176 (5th Cir. 1974) and McIntoch v. Woodward, 514 F. 2d 95 (5th Cir. 1975).

Van Curen notes for the Court that the Tenth Circuit Court of Appeals has reached a different conclusion in Robinson v. Benson, 520 F. 2d 920 (10th Cir. 1978).

Respondent would assert Robinson, supra, is distinguishable from the instant case. The Court in Robinson, supra, found that 28 C.F.R. Section 2.34 (1976) and Sections 2.12 and 2.13 necessitate certain requirements. Included were the notice of charges, hearings, and written reasons for the denial of parole. Also the Court found that regulations provided for a counsel substitute.

No such statutory requirement exists in Ohio. The Supreme Court of Ohio noted that no regulation required a hearing prior to rescission of a parole grant before release. State ex rel. Van Curen, supra.

Van Curen, in a supplemental brief, also argues, in part, that because this Court granted certiorari in Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 576 F. 2d 1247 (8th Cir. 1978), cert. granted, No. 78-201, rep'd at 47 U.S.L.W. 3190 (Oct. 3, 1978) that the instant petition should receive similar treatment. Respondent cannot agree.

In Nebraska, pursuant to statute, an inmate is entitled to parole when he falls within certain stated categories. See Inmates of Nebraska Penal, etc. v. Greenholtz, 576 F. 2d 1274 (1978) at pages 1280-1281, footnote 3.

The case in Ohio is reversed. Section 2967.31, Ohio Revised Code, states:

> "Notwithstanding any other provision for determining parole eligibility, a prisoner confined in a state penal or reformatory institution may be released on parole at any time after serving six months in the custody of the department of rehabilitation and correction, when all of the following apply:
>
> (A) The offense for which the prisoner was sentenced was an offense other than aggravated murder or murder.
>
> (B) The prisoner has not previously been convicted of any felony for which, pursuant to sentence, he was confined for thirty days or more in a penal or reformatory institution in this state or in a similar institution in any other state or the United States.
>
> (C) The prisoner is not a dangerous offender as defined in section 2929.01 of the Revised Code.
>
> (D) The prisoner does not need further confinement in a penal or reformatory institution for his correction or rehabilitation.
>
> (E) The history, character, condition, and attitudes of the prisoner indicate that he is likely to respond affirmatively to early release on parole, and is unlikely to commit another offense.

It is well settled in Ohio that parole is a matter of grace. Cox v. Maxwell, 366 F. 2d 765 (6th Cir. 1966); Dimarco v. Denton, 385 F. 2d 556 (6th Cir. 1967); Rose v. Haskins, 388 F. 2d 91 (6th Cir. 1968).

As the statute clearly provides, an inmate may be considered only when he meets all of the statutory criteria, and even at that point, his release on parole is within the sound discretion of the Ohio Parole Board.

Respondent submits that given the above analysis that there exists no compelling reason to grant certiorari in this case simply because the Court determined that in Greenholtz, supra, such action was warranted.

Moreover, Respondent would submit that due to this Court's crowded docket that some consideration must be given to what impact this case will have upon our nation as a whole.

When one looks at the small populace effected by such case in Ohio, there exists no compelling reason for this Court to grant certiorari.

During the course of this litigation, it was developed that out of ten thousand (10,000) parole hearings per year, six thousand (6,000) parole grants are awarded with somewhere between nine (9) to twelve (12) such grants being rescinded. (Nolan Snyder Depo., pages 73-74 and 112-113; Shoemaker Depo., page 14). This clearly evidences that very few people will be touched by a decision in this case.

However, should the Court determine that this issue does have far reaching results, Respondent would submit that this case does not present the Court with a factual background which permits an undisturbed review of due process considerations in the area of parole rescissions.

The record is clear that Van Curen was untruthful concerning his parole plan. He admitted that his sponsor was not his half-brother but rather a homosexual lover. (Van Curen Depo., page 59, et seq.).

Given this misrepresentation, as well as others, Van Curen could not have even had an expectation of release. Certainly he did not have a vested interest requiring due process protections. Consequently, this case does not provide the Court with the opportunity to review the question of due process in a parole rescission free of any factual taint.

CONCLUSION

For all the foregoing reasons, Respondent prays that the petition for a writ of certiorari filed herein be denied. Rice v. Sioux City Memorial Cemetary, 349 U.S. 79 (1970).

Respectfully submitted,

WILLIAM J. BROWN
Attorney General

Simon B. Karas

SIMON B. KARAS
DENNIS L. SIPE
Assistant Attorneys General
State Office Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43215
(614) 466-5414

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response To Petition For A Writ Of Certiorari has been forwarded to petitioner's counsel, Louis A. Jacobs, 1659 North High Street, Columbus, Ohio, 43210, via the U.S. Postal Service, this 28th day of November, 1978.

Simon B. Karas
SIMON B. KARAS
Assistant Attorney General